FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 13, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-513
Petitioner,	:	A.C. No. 12-02316-186352
	:	
	:	Docket No. LAKE 2009-631
v.	:	A.C. No. 12-02316-192274
	:	
TRIAD UNDERGROUND MINING, LLC,	:	
Respondent.	:	Mine: Freelandville Underground

DECISION

Appearances: Matthew Linton, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Petitioner
John Williams, Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Triad Underground Mining, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve two violations in Docket No. LAKE 2009-513 with a total proposed penalty of $54,518.00 and three violations in Docket No. LAKE 2009-631 with a total proposed penalty of $12,924.00. The citations were issued by MSHA under section 104(a) of the Mine Act at the Freelandville Underground Mine. The parties presented testimony and documentary evidence at the hearing held on October 26, 2010 in Evansville, Indiana.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Triad Underground Mining, LLC, ("Triad" or "Respondent") is the owner and operator of the Freelandville Underground Mine (the "Mine") located in Knox County, Indiana. The Respondent agrees that it is subject to the jurisdiction of the Mine Safety and Health Administration and that the Administrative Law Judge has jurisdiction to issue this decision.

Stip 1-4. In April and June of 2009, MSHA inspectors conducted a regular inspection and spot inspections of the Mine. As a result of the inspections, the five violations contested herein were issued. At hearing, one citation was modified and the mine operator agreed to resolve the issues as to two of the citations. The settlement agreement is incorporated below.

A. Docket No. LAKE 2009-513

i. *Citation Nos. 8415816 and 8415820*

a. **The Violations**

This docket includes two citations, both issued by Inspector Glen Fishback on April 15, 2009. Fishback has been a mine inspector since 2007. He had 25 years mining experience prior to joining MSHA, and currently holds a number of certifications in mining. Fishback described the Freelandville Mine, located in Freelandville, Indiana, as an underground coal mine that uses the room and pillar method of mining. (Tr. 16-17). He has inspected the Mine a number of times and explained that a regular inspection normally takes about a month and half to complete. The Mine is subject to spot inspections due to the amount of methane that it liberates.

On April 15, 2009, Fishback traveled to the Mine to conduct a spot inspection, followed by a regular inspection. He was accompanied during the inspection by Mine's safety director, Sam McCord, and an MSHA inspector trainee. As a result of his inspection, Fishback issued two citations for failure to have directional markers on the lifeline in the primary escapeway.

A map of the Mine, submitted as Gov. Ex. 9, shows the primary escapeway where the lifeline was placed. The portal is shown on the lower right corner of the map, the working section in the upper right corner, and the green line is the primary escapeway. The working section is approximately four miles from the portal and, hence, the lifeline stretches for about four miles along the primary escapeway, while a second lifeline is in the secondary escapeway. The Mine utilizes a blowing ventilation system where all incoming air travels from the portal to the active section. Fishback was traveling the air course and examining the ventilation when he observed the alleged violations.

The two citations are identical in that they allege violations of the same mandatory standard and allege facts that are similar, i.e. that directional cones on the lifeline were missing for lengths of up to 300 feet. In each instance, Fishback believed that the Mine reused the lifeline by tying it together and failed to determine if the directional cones were properly in place once the line was reconnected.

Citation No. 8415816 describes the violation as follows:

> The 2nd West panel primary escapeway lifeline was not equipped with directional indicators signifying the route of escape, placed at intervals not exceeding 100 feet. This hazard was observed between crosscut number 12 to crosscut number 17, approximately

> 300 feet, between crosscut number 17 to crosscut number 19 ½ approximately 150 feet and from crosscut number 19 ½ to crosscut number 23 approximately 150 feet.

Fishback determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that thirteen employees were affected, and that the negligence was high. A civil penalty in the amount of $27,259.00 has been proposed for this violation. The Respondent does not dispute the facts as set forth by Fishback in both his narrative and his testimony as they apply to the violation, i.e. that the directional cones were not in place on the lifeline. Triad does dispute the findings of gravity and negligence. Triad Br. 2-3.

Citation No. 8415820 describes the violation as follows:

> The 1st Main North off the Main West Number 2 primary escapeway lifeline was not equipped with directional indicators signifying the route of escape, placed at intervals not to exceeding (sic) 100 feet. This hazard was observed between crosscut number 23 to crosscut number 28, a distance of approximately 300 feet and from crosscut number 10 to crosscut number 13 a distance of approximately 150 feet.

Fishback determined that it was reasonably likely that the violations would result in a fatal injury, that the violation was significant and substantial, that thirteen employees were affected, and that the negligence was high. A civil penalty in the amount of $27,259.00 has been proposed for this violation. Again, the Respondent does not dispute the underlying facts of the violation and agrees that the cones were not in place. Triad does dispute the negligence and gravity of the violation. Triad Br. 2-3.

The citations were both issued for a violation of 30 C.F.R. §75.380(d)(7)(v) which states as follows:

> Each escapeway shall be. . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [e]quipped with one directional indicator cone securely attached to the lifeline, signifying the route of escape, placed at intervals not exceeding 100 feet. Cones shall be installed so that the tapered section points inby[.]

Fishback testified as to the facts of the alleged violations as set forth in each of the citations. The directional cones were placed at intervals exceeding 100 feet. In Citation No. 8415816, he found cones missing for intervals of 150 feet in two areas, and missing for 300 feet in another area. In Citation No. 8415820, he found cones missing for intervals of 150 and 300 feet. Citation No. 8415820 was issued for violations found two hours after, and in an area

distinctly different from, the violations that were the subject of Citation No.8415816. (Tr. 21-23, 31-33).

Sam McCord, the safety director for the Mine, has been in mining since 1995, and is involved in training miners on the correct use of the escapeways at the Mine. He testified that this is a one unit mine with 13 men normally working on the section. According to McCord, it is roughly four miles from the portal to the working area, and the lifeline is roughly four miles in length. McCord observed the area addressed in Citation No. 8415816 and agrees that the cones were missing in that area. McCord did not observe the area addressed in Citation No. 8415820 and there is some disagreement about the exact location where the alleged violations existed. However, McCord does not dispute the lack of directional cones in both areas. Both Fishback and McCord testified that the mine operator reuses the lifeline by reconnecting the ends of the line with a knot, as opposed to using or adding a new line. As a result, the cones are often moved during reconnecting of the lifeline. Fishback saw nothing on the ground to indicate that directional cones had properly been in place but had fallen to the ground.

There is little, if any dispute, that the directional cones were missing. The standard clearly requires the cones to be located at a minimum of every 100 feet along the lifeline, which they were not. The violation is obvious. I conclude that the Secretary has met her burden and affirm the violation in each of the two citations.

b. **Significant and Substantial Violation**

A significant and substantial violation is described in section 104(d)(1) of the Act as a violation of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. A violation is properly designated S&S if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.,* 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek coal Inc. v. MSHA,* 52 F.3d. 133, 135-136 (7th Cr. 1995). Inspector Fishback qualifies, without question, as an experienced MSHA inspector. He described the violation as significant and substantial and explained that, in the event a fire or other emergency were to occur at the Mine, the lack of the directional cones would likely lead to a serious injury. The reasoning and testimony is identical for both violations.

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007 (Dec. 1987). I find that the facts of this violation clearly lead to a finding that it was a significant and substantial violation. First, as discussed above, both violations as described in the citations are affirmed. Next, the safety hazard created by the violations, i.e., the inability to safely follow along the primary escapeway in the event of an emergency, will result in an injury to a number of miners. And finally, that injury will be serious.

Fishback testified that it is reasonably likely that a substantial injury would occur due to the number and types of hazards in the area cited. He has cited the Respondent numerous times for float dust, the presence of ignition sources, and low air quantities. He has also issued citations for accumulations, both on equipment and in along the belt, and, in some instances, the accumulations existed for great distances. Fishback explained that the working section is full of electrical equipment and many other possible sources of ignition. (Tr. 23-25).

Were a fire to break out, it is likely that the ventilation system would be breached and the primary escapeway would fill with smoke or gas, leaving the lifeline as the only means to assist in directing the miners out of the Mine. Miners often become disoriented in smoke and dust and don't recall which direction to travel. A miner may panic and take off in a different and dangerous direction. Miners are expected to be tied together as they travel the escapeway. If one miner tied to a group becomes disoriented, he could lead the entire group in the wrong direction. Pursuant to the facts of this case, a disoriented miner could potentially lead a group of miners up to 300 feet in the wrong direction, and then have to turn around and travel back the 300 feet to the next directional cone. Time is precious in an emergency, and having to travel an extra 600 feet would substantially affect the safety of the miners. Fishback explained that when miners panic, they often forget what is learned in training. This is especially true when there is little to no visibility and it is critical to find a quick route out of the mine. There were at least 13 miners on the working section. In addition, there were more miners working in other areas of the Mine who would be required to use the escapeway and the lifeline to evacuate the Mine.

Triad argues that it is unlikely that there will be an explosion or other event at the Mine that would necessitate the use of the primary escapeway. Even if there were such a need, the miners are well trained on the escape protocol and the missing directional cones would not hinder their quick escape. Hence, the Respondent argues that the violations are not S&S.

I first address the issue of the likelihood of an explosion, fire or other emergency. There are a number of mandatory standards that are designed to protect miners in the event of an emergency. Among those standards are the escapeway regulations and, as pertinent to this analysis, the requirement that lifelines be installed and directional cones be placed on those lifelines. I agree with the Secretary that, for purposes of the S&S analysis, this regulation must be evaluated in terms of an emergency, i.e. assume that an emergency will occur and evaluate the likelihood of a reasonably serious injury in that context. To do otherwise would mean that all emergency regulations would rarely be found to be S&S, which would be "inherently illogical" and inconsistent with the Mine Act. *See Consolidation Coal Co.* 824 F.2d 1071, 1086 (D.C. Cir. 1987). In order to properly evaluate the S&S designation of the missing cones on the lifeline, I conclude that I may assume the existence of an accident or emergency. However, I do not find such assumption necessary in this case.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operations. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co*., 7 FMSHRC 1125, 1130 (Aug. 1985). Thus, I address the likelihood of an emergency and, within the context of that emergency, whether the lack of directional cones for up to 300 feet creates a reasonable likelihood that the hazard will result in a serious injury. McCord described the emergency training that miners received at the Mine. Every 90 days there is a fire drill at the Mine and the management reviews the location of SCSRs and the lifelines. The miners are reminded where to meet in the event of an emergency and are instructed that no one is to be left behind. The miners meet at a predetermined location and, if they must walk out of the Mine, they tether together and calmly walk the escapeway using the lifeline and its directional cones to determine the correct route of escape. (Tr.77-80). The cones, depicted in Triad Exs. E and G, can dislodge from their location on the lifeline and slide down the line. In addition, the cones can be completely dislodged from the lifeline and fall to the mine floor, especially during the rock dusting process. (Tr. 80). McCord believes that if any injury were to be sustained, it would not be fatal given the type of employees at the Mine and the training they receive. He has a lot of confidence in the men and the training and argues that a few missing cones "are not going to deter them." (Tr. 87). According to McCord, the miners will know which direction to travel by feeling the air movement. However, while miners may be trained on procedure during an emergency, it does not take away from the fact that a fire or explosion could potentially occur, nor does it definitively determine what actions any miner will take when that explosion occurs.

Fishback addressed the likelihood of an accident or explosion when he testified that he has cited the Mine many times for extensive accumulations, including accumulations of coal dust and float coal dust. Fishback took into account the number of ignition sources he has found during his inspections and the number of ventilation issues, including low air quantities in some areas. Assuming the continued course of mining, the fact that this is considered a gassy mine, and the previous violations, I am persuaded that an emergency is reasonably likely to occur.

Once an emergency is established, the record supports a finding that the lack of directional cones on the lifeline in the escapeway is likely to lead to a serious injury. First, Fishback testified that there is no certainty that in an emergency the ventilation will stay intact and further,

if it is breached, it will cause added confusion about the direction of travel. Even well-trained miners panic in an emergency. The lack of directional cones will only add to the panic. Fishback explained that, based upon his experience and what has been learned in the mining industry over the years, when an emergency occurs a miner who is lost and disoriented may lose his life if he cannot hold onto a lifeline and quickly find his way out of a mine. Missing cones will further disorient the miner and waste precious time that needs to be spent trying to exit the mine. Even worse, a miner may be tied together with other miners and lead them in the opposite direction of safe escape. Each miner is different. Some may have medical problems, others may panic more readily, while some may lose their sense of direction easily. Rapidly finding their way through a mine during an emergency is difficult. The escapeway may be filled with smoke and fumes. Further, it is difficult to see the route when wearing a SCSR, and traveling along an uneven terrain filled with holes and water doesn't make it any easier. Time is important in an emergency or disaster. Fishback opines that, if miners are led in the wrong direction, there is a possibility that their SCSR would be exhausted by the time they realize their mistake, turn around, and reach the next station.

I credit the testimony of Fishback in determining that the violations are S&S. He correctly pointed out that the behavior of miners in an emergency is a large part of the process of an orderly escape. Not all miners can be counted on to avoid panic and disorientation. The hazard created by the missing cones on the lifeline is not being able to quickly and safely escape the Mine no matter what condition a miner may be in. The hazard will result in a fatality of one or potentially all of the miners in the area. I find that the Secretary has established that both lifeline violations are S&S.

c. **Negligence**

Fishback determined that both of the violations regarding the directional cones on the lifeline were the result of high negligence on the part of the operator. He based his determination on his belief that, due to the extent of the condition, the condition should have been discovered by the examiner and corrected. Further, nothing was noted in the inspection report, although it appeared to Fishback that the condition had existed for some time. Fishback believes that the reuse of the lifeline is the heart of the problem. The lifeline was retied and was not checked for missing cones along its length. Fishback testified that correcting the problem was simple and should have been done before the inspector arrived.

Fishback's negligence analysis relies heavily on the lack of any entry about the missing cones in the examiners' record book. In his inspection notes, he indicates that the examiner last entered a note about the lifeline on 4/13/09, i.e. three weeks before the violations were found by Fishback. Therefore, Fishback believes that the condition existed for the entire three weeks before his inspection, but had not been noted in the mine books. Further, he also relied upon his determination that the cones had been missing for weeks since he saw no cones on the ground, and no fallen roof material or other evidence that the cones had recently been knocked out of place or off the lifeline. McCord disagrees with Fishback and testified that the lifeline is examined in its entirety every week when the weekly escapeway examination is conducted. The lines are also examined each time they are moved or retied. McCord reviewed the examination

books for the escapeway and saw no record of any hazard or missing cones. (Tr. 86). Therefore, McCord assumes that the cones were not missing when the line was last inspected, and there was no need for an entry in the examination book.

I find that the Secretary has not demonstrated that the negligence was anything more than moderate in this circumstance. Fishback did not see any entry in the examiners books, and only assumed that the condition existed from the time of the last examination entry in the books. While the ground under the lifeline did not indicate that the cones had fallen recently, McCord credibly testified that the condition did not exist at the time of the last examination. The Secretary has not met her burden of demonstrating that the Respondent knew of the missing cones and failed to replace them, or that the mine examiner had observed the missing cones and failed to record the condition in the book. I find the negligence to be moderate and, therefore, adjust the penalty to reflect the lower negligence.

Finally, Triad argues that Fishback should not have issued two citations for a violation of the identical standard. I find that Fishback was justified in doing so. He found the violations in two separate and distinct areas, and determined that a number of cones were missing in each area. He grouped the violations that were in the same general area, but when he came to a second and somewhat distant area with more missing cones, he was well within his discretion to issue the second violation of the same standard. If he were not permitted to issue violations for the same standard during an inspection, it would greatly curtail his enforcement ability.

B. Docket No. LAKE 2009-631

i. *Citation Nos. 8415898 and 8415899*

At the hearing, the parties agreed to resolve two of the citations contained in this docket on the following terms:

Citation No. 8415898: The parties agreed no modification is made to the citation but the Secretary agrees to reduce the proposed penalty from $7,578.00 to $6,062.00.

Citation No. 8415899: The parties agreed that the citation will remain as issued but the Secretary agrees to modify the proposed penalty from $3,689.00 to $2,951.00.

ii. *Citation No. 6682723*

On June 18, 2009, inspector Charles Jones issued a citation to Triad for an alleged violation of 30 C.F.R. § 75.380(e) which requires that "[s]urface openings shall be adequately protected to prevent surface fires, fumes, smoke, and flood water from entering the mine." The citation states that "[t]he mine has experienced flood water entering into the underground workings through the mine portals in the pit."

Jones determined that the violation was unlikely to result in an injury, that fifteen employees were affected, and that the negligence was high. A civil penalty in the amount of $1,657.00 has been proposed for this violation. For the reasons set forth below, I affirm the violation and the finding of high negligence, and increase the proposed penalty based upon the gravity of the violation.

Inspector Charles Jones has 42 years mining experience and was a mine inspector with MSHA for 5 years before ending his career as a roof control specialist in the Vincennes district office. He is currently an instructor at Vincennes University and holds a number of certifications in mining. He visited the Freelandville mine many times prior to the inspection he conducted in June of 2009.

On the day he issued the citation, Jones traveled to the Mine to follow up on a report of an inundation of water. The Mine is required to report such an incident within 15 minutes of its occurrence. Jones was assigned to investigate the emergency. Prior to leaving the MSHA office he had a discussion with the assistant district manager who informed him that the Mine had been put on notice the month before this incident about the importance of controlling the water entering through the portals. When Jones arrived at the Mine, he observed that the "mine was not adequately protected" because both portals had been flooded.

The morning of the incident, there had been heavy rain storms in the area which, in turn, caused flooding and flood water to enter into the portal entrances. When Jones arrived the power was off and the water was deep enough that Jones could not enter either portal. Water traveled from the surface into the underground area of the Mine as a result of a breach in a ditch and non-functional sumps and pumps. In Jones' view, the Mine was not adequately protected since the water was not kept out of the Mine. As a result, he issued a citation for what he determined was a violation of section 75.380(e). (Tr. 59-61). The Respondent agrees that the portals were flooded. McCord testified that, on June 18, 2009, the Mine, prior to the rain storm, lost power at 7:35 a.m. The miners were removed from the Mine beginning at 7:40 a.m. and were out of the Mine when the torrential rain began. McCord stated that there were two storms, the first of which dropped two and a quarter inches of rain, and a second at 9:10 a.m. that dropped an additional two inches of rain. The water began to run into the Mine around 8:45 a.m. The Mine has two sump pumps at the portal. Due to the loss of power, neither sump pump was operational. However, a diesel pump remained in operation but could not handle the flood of water. The water ran over the sumps and into the portals. The portals became filled to the point that they were impassable. (Tr 89-92).

The mandatory standard is clear that surface openings, i.e. the portals, shall be adequately protected to prevent flood water from entering the mine. Here, after the first rain, the flood water entering the Mine made it impossible to enter or exit through the portals. The Secretary argues that when flood water enters a mine in a quantity that makes a portal impassable there is sufficient evidence that the portal is not adequately protected. The Respondent agrees that the portals were flooded as described by the inspector but argues that there is no violation because the regulation is silent on the meaning of "adequate protection" against the flood water. The Respondent also argues that the plans in place to prevent the flood water from entering the Mine

are enough to satisfy the requirement of the regulation. The plan, identified as Triad Ex. I and dated May 2002, was developed in response to a request by MSHA to explain what steps would be taken to "prevent any future flooding." The plan includes sumps and enlarged, cleaned ditches. There is also an undated plan, Triad Ex. K, that includes the pumps, the diesel pump, and maintenance of ditches. Triad points out that MSHA did not require diesel pumps or a generator (to be used in the event of power loss) in the initial plan. The Mine also has a plan for notification in the event of rising water at the Mine entrance. Triad Ex. L.

I conclude that, although the plans are useful in setting forth the procedures for protecting the portals from flooding, they do not substitute as a means to comply with the standard. Implementing the plan, in the event it is a useful plan, may assist in protecting against flooding. However, in this case, the plan or plans were not able to be implemented since the pumps were not working and the ditch had been breached. Having a plan in place is of little value, and offers little protection, when it does not work to keep the water from entering the mine.

The standard requires that portals be adequately protected against flood water. Adequate protection includes making certain that the Mine is prepared, and adequate measures are in place to prevent water from entering the portals to the extent found by Jones. Webster defines "adequate" as "satisfactory or acceptable" and "protection" as an action taken to "keep safe from harm." In this case, the harm is the water in the portals that, due to its depth, will prevent the miners from traveling out of the Mine. The acceptable way to keep the water out of the Mine is to have functioning pumps, or other safety measures, that will prevent the water from entering the portals in any situation, including large rain-generating storms. Jones expressed the Secretary's position when he testified that, because the portals were flooded, there was not an adequate means of keeping the water out, i.e of protecting the portals. I conclude that the Secretary's interpretation of the standard is reasonable and, consequently, I find that the Secretary has met her burden of proving the violation. The regulation is not ambiguous and, as such, the Secretary's interpretation of her own regulations is generally entitled to substantial deference so long as it is reasonable and consistent with its purpose. *Martin v. OSHA*, 499 U.S. 144 (1991). I conclude that the interpretation of the regulation is based upon its plain meaning and is reasonable.

In a similar case, a Commission Judge found a violation of §75.380(e) based on rising water levels in an open strip pit. The water level threatened to inundate an adjacent underground coal mine. The violation was determined to be S&S and resulted from "unwarrantable failure." There the inspector testified that water and saturated mud had collected in the pit in front of the portals and water was already flowing into the underground mine. *Georges Colliers Inc*., 20 FMSHRC 296 (Mar. 1998) (ALJ). The ALJ found that the water and mud that was beginning to collect in front of the portals was enough to demonstrate that the portals were not adequately protected from water. In addition, a non-functional pump did nothing to take away from the ALJ's determination that a violation occurred, even with a plan in place.

Jones did not mark this violation as significant and substantial because, in his view, the miners had already been removed from the Mine due to the power failure which occurred before the Mine became flooded. All miners had been evacuated by the time Jones arrived but, had

they not been brought out at that time, the water would have prevented them from leaving through the portals and, consequently, they would have been trapped in the Mine. This Mine has up and down rises and, as described by Jones, areas would fill with water to a point that miners could not escape the Mine. The Mine, in this instance, was fortunate that the power outage occurred far enough in advance of the storm that there was enough time to evacuate the Mine prior to the water rising. Had the Mine not been evacuated earlier, the miners would have been trapped due to the flooded portals. Therefore, I find the gravity of the violation, for purposes of penalty, to be greater than that determined by Jones.

Finally, Jones designated the violation as high negligence. He understood that the Mine had been put on notice just one month earlier as to the issue of flood waters inundating the portals and the Respondent's failure to adequately control such from recurring. McCord agrees that the Mine had a similar inundation the month before the citation issued by Jones. After the May inundation, the Respondent spoke to Mary Jo, the MSHA assistant district manager, and she provided suggestions about how to deal with the water problem. However, McCord testified that she didn't "insist" on anything after the incident in May. (Tr. 95). The Mine had a water control plan in place in May 2002. However, there is no evidence that the plan was changed, or any additional precautions taken, after the portals flooded in May, i.e. just one month before the incident at issue here. Therefore, I agree with Jones that the negligence of the operator is high.

In order to terminate the citation, the Mine submitted a new plan in an effort to make certain that the portals did not flood in the future. The new plan included the installation of additional pumps, a generator for the pumps in the event power was lost, and cleaning of the sump and ditches. The plan also addressed the diversion ditch which was breached and contributed to the flood cited by Jones. The fact that the assistant district manager did not "insist" on these changes prior to the water inundation in June does not relieve the operator of its responsibility to keep the portals free from water.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. 2700.28. The Act requires, that Ain assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the

person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at the Mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation above, and I accept those designations for the three citations that are subject to the settlement agreement. I assess the following penalties:

Citation No. 8415816	$ 22,000.00
Citation No. 8415820	$ 22,000.00
Citation No. 8415898	$ 6,062.00
Citation No. 8415899	$ 2,951.00
Citation No. 6682723	$ 2,000.00

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C.§820(I), I assess the penalties listed above for a total penalty of $55,013.00. Triad Underground Mining LLC,. is hereby **ORDERED** to pay the Secretary of Labor the sum of $55,013.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (Certified U.S. Mail)

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